STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

GARY PATRICK LEWIS,

Defendant-Appellee.
_____/

Supreme Court No.

Court of Appeals No. 325782

Lower Court No. 14-6454-01

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellant
_____

CHARI K. GROVE (P25812)
Attorney for Defendant-Appellee
_____

NOTICE OF HEARING

ANSWER IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on December 23, 2014. Defendant appealed as of right, and his convictions were reversed in a unanimous opinion by the Court of Appeals on July 21, 2016. The People have filed an Application for Leave to Appeal that decision. The Court of Appeals was clearly correct in finding that Defendant was denied counsel at the preliminary examination, a critical stage of the proceedings, that the error is structural, and that reversal is required. Therefore, this Court should deny the People's Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AT THE PRELIMINARY EXAMINATION; BECAUSE HE SUFFERED THE TOTAL DEPRIVATION OF COUNSEL AT A CRITICAL STAGE, THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THIS STRUCTURAL ERROR DEMANDS REVERSAL OF HIS CONVICTIONS; THIS COURT SHOULD NOT ADDRESS THE NEWLY-RAISED ISSUE OF FORFEITURE BUT DEFENDANT DID NOT FORFEIT HIS RIGHT TO COUNSEL.

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant Gary Lewis was accused of starting several fires in vacant buildings in the city of Detroit on March 2, 2014. No one saw him start any of the fires, but witnesses claimed to have seen him enter abandoned houses and exit shortly before the fires began. All of the witnesses were shown photographic lineups and two of them selected Mr. Lewis's photo. The third witness claimed to have recognized Defendant's voice when he spoke at the preliminary examination. No corporeal lineup was conducted. A sign was located in one of the buildings stating that Pieter Folscher started the fires, and the jury was allowed to compare the writing on the sign with a letter Mr. Lewis wrote to the court. The jury found Mr. Lewis not guilty of arson with regard to that building. Defendant was arrested a few blocks from one of the fires. The police lost crucial tangible evidence allegedly seized from Mr. Lewis, but the prosecutor used a photograph of the lost evidence in its case against Defendant. Mr. Lewis testified and maintained that he was in the area for a different purpose.

Defendant appeared for the preliminary examination on July 30, 2014, with appointed attorney Brian Scherer. A disagreement arose between Mr. Lewis and Mr. Scherer making his continued representation inappropriate, and the district court concluded from this that Mr. Lewis had elected not to have counsel represent him. Defendant protested that “I never said that.” (PET 4). The court stated that the hearing would proceed without representation for Mr. Lewis, but that Mr. Scherer would act as stand-by counsel. In response to the prosecutor’s concerns, the judge said, “There is nothing else I can do.” (PET 5). Mr. Lewis became upset and told the judge he was violating his rights. He also accused Mr. Scherer of harassing him and disrespecting his deceased mother. (PET 7-9). The judge had Mr. Lewis removed from the courtroom. Since there was no defendant to “stand by,” the court dismissed Mr. Scherer, and the

preliminary examination was conducted with only the prosecutor. There was no cross-examination of the witnesses. Mr. Lewis was bound over on all six counts of second- and third-degree arson.

The Court of Appeals held that the total deprivation of counsel at the preliminary examination, a critical stage, was structural error and that reversal was required. In dicta, two judges stated their belief that harmless error should apply. The two judges also decided to unnecessarily address Defendant's remaining issues. Judge Servitto, concurring, stated that the opinion should have been limited to the finding of structural error:

> "I concur in the result reached by the majority—that defendant's convictions should be vacated. However, I believe that because Michigan law holds that the complete denial of representation of counsel at a critical stage of the proceeding (here, the preliminary examination), is a structural error requiring automatic reversal (*see, e.g.,. People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551(2000)), that holding alone should represent the entirety of our opinion. The remaining analysis regarding structural error and the analyses of the remaining issues raised by defendant are unnecessary to our resolution of this case."

Plaintiff-Appellant filed an Application for Leave to Appeal.

I. DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AT THE PRELIMINARY EXAMINATION; BECAUSE HE SUFFERED THE TOTAL DEPRIVATION OF COUNSEL AT A CRITICAL STAGE, THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THIS STRUCTURAL ERROR DEMANDS REVERSAL OF HIS CONVICTIONS; THIS COURT SHOULD NOT ADDRESS THE NEWLY-RAISED ISSUE OF FORFEITURE BUT DEFENDANT DID NOT FORFEIT HIS RIGHT TO COUNSEL.

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Standard of Review

Appellate courts review the record de novo to determine whether the waiver of the right to counsel was constitutionally adequate, knowing, and intelligent. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). *See also People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004). This Court reviews the lower court's "interpretation of the law or the

application of a constitutional standard to uncontested facts…de novo." *People v Russell, supra* at 187. No objection is required to preserve this issue for review, as the nature of this error makes such a requirement senseless. *Hunt v Mitchell*, 261 F3d 575, 582 (CA 6, 2001). *See also Powell v Alabama*, 287 US 45, 57-58; 53 S Ct 55; 77 L Ed 158 (1932) (finding a reversible denial of the right to counsel where defendant did not object). Where there is a total deprivation of counsel, automatic reversal is required. *United States v Cronic*, 466 US 648 (1984).

The Total Deprivation of Counsel and the Denial of Confrontation at the Preliminary Examination Are Structural Errors Requiring Automatic Reversal

The right to counsel is one of the most fundamental of all constitutional rights. *Gideon v Wainwright*, 372 US 335 (1963). US Const, Ams VI, XIV; Const 1963, art 1, sec 20. The United States Supreme Court has held that a person accused of crime "requires the guiding hand of counsel at every step in the proceedings against him," *Powell v Alabama*, 287 US 45, 69 (1932), and that that constitutional principle is not limited to the presence of counsel at trial. "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v Wade*, 388 US 218 (1967); *Coleman v Alabama*, 399 US 1, 7 (1970).

In finding that Defendant suffered the total deprivation of counsel, the Court of Appeals in the instant case conceded that the waiver of counsel was not voluntary. See MCR 6.005(D); *People v Russell, supra* at 190; *People v Anderson*, 398 Mich 361, 367-368 (1976). *See also Faretta v California*, 422 US 806, 834 (1975). There was clear noncompliance with the requirements for a valid waiver. Mr. Lewis did not give up his right to an attorney, and he never requested self-representation. The trial court failed to ask any questions to determine whether Defendant wanted to waive counsel, much less give him advice of the dangers of self-

representation. Instead of postponing the proceedings to allow counsel to be present and to allow Mr. Lewis to calm down, the judge expelled him from the courtroom, told his attorney to leave, and ordered the prosecutor to proceed with the testimony. The preliminary examination proceeded as a wholly one-sided affair, with no cross examination of any of the witnesses. The Court of Appeals correctly ruled that Defendant suffered the total deprivation of counsel at a critical stage of the proceedings, and that reversal was required.

A preliminary examination is a critical stage of the proceedings at which defendant is entitled to counsel. *Coleman v Alabama, supra; People v Carter*, 412 Mich 214, 216-17 (1981); *People v Williams*, 470 Mich 634 (2004). The right to counsel is of constitutional dimension. In *Coleman*, the United States Supreme Court held that Alabama's preliminary hearing was a critical stage of that state's criminal process which entitled the accused to the assistance of an appointed lawyer:

> "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the state's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the state's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the state has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." 399 US 9.

The Court in *Coleman* remanded so that an inquiry could be made as to the prejudice to the defendant from the absence of a lawyer at the preliminary hearing. However, the decision in *Coleman* predates the decision in *United States v Cronic*, *supra*, that the complete denial of

counsel at a critical stage of a criminal proceeding is structural error that requires reversal without any showing of prejudice. The Michigan courts have also held that "it is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal." *People v Buie*, 298 Mich App 50, 61-62 (2013); *People v Willing*, 267 Mich App 208, 224 (2005); *People v Arnold*, 477 Mich 852 (2006).

In *Cronic, supra*, the United States Supreme Court held that an appeals court must reverse a criminal defendant's conviction "without any specific showing of prejudice to defendant when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." 466 US 648. In other words, when counsel is totally absent during a critical stage of the proceedings, prejudice must be presumed:

> "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), because the petitioner had been "denied the right of effective cross-examination" which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " *Id.*, at 318, 94 S.Ct., at 1111." 466 US 648, 658–59.

Structural errors, as explained by the Supreme Court in *People v Duncan*, 462 Mich 47, 51 (2000), *citing Neder v United States*, 527 US 1, 8 (1999), are *intrinsically* harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unreliable the determining of guilt or innocence

The Supreme Court in *Hamilton v Alabama*, 368 US 52 (1961), decided well before *Cronic*, explained an important reason for the presumption of prejudice in such a situation. The *Hamilton* Court reversed a conviction and death sentence for breaking and entering with intent to ravish because the defendant was not represented at the arraignment. The Court found that the arraignment "is a critical stage in a criminal proceeding," and consequently counsel must be provided for an indigent defendant at that time. Significantly, there was no indication that the defendant had in any way been prejudiced by the failure to have counsel at the arraignment. The Supreme Court of Alabama had stated that, under Alabama law, Hamilton should have had counsel at the arraignment, but did not reverse the conviction because there was "no showing or effort to show that Hamilton was disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty." The Supreme Court of the United States reversed, ruling that there was no need for a showing of prejudice because the degree of prejudice can never be known:[1]

> "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.... *In this case . . . the degree of prejudice can never be known*. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."

See also Holloway v Arkansas, 435 US 475, 490-491 (1978). Accordingly, as the Court recognized in *Willing* and *Buie, supra, Cronic* requires application of an automatic reversal standard anytime there is a total denial of counsel at a critical stage in the proceeding. A stage is "critical" when "*potential* substantial prejudice to defendant's rights *inheres* in the particular confrontation and the ability of counsel [would] help avoid that prejudice." *Coleman v Alabama,*

[1] See also Judge Kaufman's dissenting opinion in *People v Carter*, 101 Mich App 529 (1980) rev'd 412 Mich 214 (1981) (pre-*Cronic*): "Although defendant's attorney did have an opportunity to cross-examine the witness at trial, there is no way of knowing whether vigorous cross-examination at the preliminary examination would have brought out evidence different from that which was presented at trial.

supra at 7. *See also People v Buckles*, 155 Mich App 1, 6 (1986): "Once adversary judicial proceedings have been initiated, a defendant's right to counsel extends to every 'critical stage' of the prosecution, i.e., every stage where the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." "[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *People v Kurylczyk*, 443 Mich 289, 296 (1993), quoting *United States v Wade*, *supra*.

The Court of Appeals' majority, in several pages of *obiter dictum*, stated that it would apply the harmless error rule were it not constrained by United States Supreme Court and federal law. Judge Servitto, concurring, objected to this "analysis":

> "I concur in the result reached by the majority—that defendants convictions should be vacated. However, I believe that because Michigan law holds that the complete denial of representation of counsel at a critical stage of the proceeding (here, the preliminary examination), is a structural error requiring automatic reversal (*see, e.g.,. People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551(2000)), that holding alone should represent the entirety of our opinion. The remaining analysis regarding structural error and the analyses of the remaining issues raised by defendant are unnecessary to our resolution of this case."

Nevertheless, Defendant will respond. The Court in its *dicta* cited the "requirements" in order to apply the automatic reversal remedy, and focused on whether the error "infects the entire proceedings." Contrary to the (unnecessary) interpretation by the Court of Appeals, the total deprivation of counsel at the preliminary examination *does* infect the entire proceedings. Even where the defendant himself is present (Mr. Lewis was not present), he or she does not have the skill to cross-examine witnesses in order to elicit impeachment evidence that can be used at trial; the defendant does not have the skill to expose the weaknesses in the prosecution's case; the defendant does not have the skill to develop defenses, or evidence to use at a suppression

hearing; the defendant does not have the skill to obtain discovery for use in preparation of the case; the defendant does not have the skill or knowledge to move for dismissal or to request bindover on a lesser offense. Without adequate cross-examination, for example, it is not possible to determine the extent of the lost chances for impeachment at trial. Clearly, the total deprivation of counsel infects the entire proceedings. Moreover, the Court of Appeals' and the People's position would require reversing a long line of United States Supreme Court, federal and state court precedent defining structural errors. The total deprivation of counsel has long been considered a structural error, and, by definition, a structural error is *inherently* prejudicial so that no further proof of prejudice need be demonstrated.

The Court of Appeals and the People cite *Satterwhite v Texas*, 486 US 249 (1988) in an effort to argue that total deprivation of counsel at a critical stage does not require reversal. In *Satterwhite*, defense counsel was not given advance notice that that a psychiatric examination, encompassing the issue of the defendant's future dangerousness, would take place. The psychiatrist was later allowed to testify at the sentencing hearing. This was a constitutional error because, according to *Estelle v Smith*, 451 US 454 (1981), counsel should be given advance notice. The Supreme Court applied the harmless beyond a reasonable doubt standard to this error. The important distinction, however, is that in *Satterwhite* there was no critical stage of the proceedings during which the defendant was denied counsel. There was, therefore, no structural error. In the instant case, Mr. Lewis suffered the total deprivation of counsel as well as his right of confrontation at a critical stage of the proceedings, and the errors are structural.

The prosecutor has cited (in addition to some pre-*Cronic* cases) a couple of unpublished post-*Cronic* cases and some cases from other jurisdictions, none of which are controlling. Those decisions do not fully appreciate the importance of the preliminary examination and do not

address the fact, discussed in *Hamilton, Holloway*, and *Cronic*, that there is no way to determine the degree of prejudice from the total deprivation of counsel. Moreover, in those cases, although the waiver of counsel was found inadequate, the defendant and stand-by counsel were present, and there was some cross-examination of witnesses or at least the opportunity for cross-examination. In the instant case, there was no opportunity at all for cross-examination, and Defendant was completely denied his Sixth Amendment right to confront his accusers. The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. *Davis v Alaska*, 415 US 308, 315 (1974); *Pointer v Texas*, 380 US 400 (1965). The primary interest secured by the right of confrontation is the right of cross-examination. *Douglas v Alabama*, 380 US 415, 418 (1965). Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. The cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but also to impeach and discredit the witness. *Davis v Alaska, supra* at 316. At the preliminary examination, confrontation and cross-examination by a skilled attorney is no less vital than at trial. As the Court explained in *Coleman v Alabama, supra*, "the lawyer's skilled examination and cross-examination of witnesses [at the preliminary hearing] may expose fatal weaknesses in the state's case" and "the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the state's witnesses at the trial." Furthermore, evidence brought out in cross-examining the People's witnesses can help in preparing the defense as well as reveal the necessity of filing pre-trial motions, such as a motion to suppress. All of these benefits of counsel at the preliminary examination affect the progress and outcome of the trial. The Court concluded in *Davis v Alaska, supra* at 318: "Petitioner was thus denied the right of effective

cross-examination which 'would be constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it*.'" Thus, where cross examination is denied, there is no requirement to show prejudice, just as there is no requirement to show prejudice where there is a total deprivation of counsel at a critical stage.

Even assuming arguendo that there should be a showing of prejudice, no such hearing as ordered in *Coleman (*pre-*Cronic*) is necessary in the instant case where the prejudice is obvious. The sole purpose of the preliminary hearing in *Coleman* was to determine whether there was sufficient evidence against the accused to warrant presenting the case to a grand jury, and, if so, to fix bail if the offense is bailable. In Michigan, of course, the main purpose of the preliminary examination is to determine whether there is probable cause to bind the defendant over for *trial*. Furthermore, not only was Mr. Lewis denied his right to counsel, he was not allowed to be present in the courtroom. There was no cross examination of witnesses at all, hampering pretrial discovery and making impeachment of the witnesses at trial nearly impossible. Further, there was no attorney present to argue against the bindover on the six charges against Defendant, or to argue for bindover on lesser offenses. This is not speculative because the jury found Mr. Lewis not guilty of one of the charges, and they found him not guilty of the charged offense as to another of the counts and instead found him guilty of a lesser offense.

Specifically with regard to the total denial of cross-examination by a skilled attorney, neither "eyewitness" was asked to describe the man they saw near the buildings that were burned, nor were the police officers required to describe Mr. Lewis or what he was wearing at the time he was detained, obviously making effective impeachment at trial impossible. Officer Mayers merely made the conclusory statement that the descriptions matched Mr. Lewis (PET 22) when, in fact, they did not. Mr. Goward described the perpetrator as wearing a red hat. Mr.

Lewis was wearing a black hat. Mr. Folson described the man as wearing an auto-repairman uniform. Mr. Lewis was wearing a windbreaker. Evidence that Mr. Folson identified someone other than Mr. Lewis in the photographic lineup was not revealed by the prosecutor. If an attorney had discovered this at the preliminary examination, he or she could (and should) have asked for a corporeal lineup. Mr. Lewis was therefore denied the defense of misidentification. Neither of the officers who detained Mr. Lewis was questioned about the items seized from Defendant (cigarette lighters and a marker). Because Defendant claimed that the lighters he had in his possession were incapable of starting a fire, had an attorney been present, he or she (or minimally Mr. Lewis himself had he been present) could have questioned the officers about the lighters and could have moved to suppress them if, at that point, the lighters had been lost (as they were at the time of trial). There was no detailed information about the condition of the buildings, and no evidence that the house on Russell was a dwelling except for the conclusory statement by Officer Mayer (PET 19-22), making an objection to the bindover appropriate.

Although Mr. Lewis is not required to show prejudice, he has demonstrated prejudice as outlined above. The Court of Appeals failed to address any of this, indicating that the only prejudice worthy of their attention would be the introduction at trial of an unavailable witness's testimony or the total waiver of a defense. The Court of Appeals, in its protracted *obiter dictum*, completely failed to acknowledge the importance of the preliminary hearing. Even if this Court wants to address the harmless error issue in lack of counsel at the preliminary examination, this is not an appropriate case. Not only was Mr. Lewis totally denied counsel, he was also ejected from the courtroom[2], leaving the prosecutor free reign to conduct the examination. Proceeding with the preliminary examination under these circumstances was a farce. The position of the People and the Court of Appeals in this case suggests a dangerous precedent, the logical result of

[2] And the district court never gave him an opportunity to return.

which is doing away with the right to counsel, the right of confrontation, and the defendant's right to be present at the preliminary examination. A warning against such a result was reiterated by the Supreme Court in *United States v Gonzalez-Lopez*, 548 US 140, 145–46 (2006), in answer to the government's argument that the defendant must demonstrate prejudice where his right to counsel of choice has been denied. The Court warned that the result is to effectively eliminate the right altogether:

> Stated as broadly as this, the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details. **It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.** What the Government urges upon us here is what was urged upon us (successfully, at one time, *see Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)) with regard to the Sixth Amendment's right of confrontation - **a line of reasoning that "abstracts from the right to its purposes, and then eliminates the right**." *Maryland v. Craig*, 497 U.S. 836, 862, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (SCALIA, J., dissenting). **Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. *See Roberts, supra*, at 65–66, 100 S.Ct. 2531. We rejected that argument** (and our prior cases that had accepted it) in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), saying that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id., at 61, 124 S.Ct. 1354.

Because the Court of Appeals ultimately rendered the correct decision to reverse his conviction based on structural error, Defendant asks this Court to deny leave to appeal.

Defendant Did Not Forfeit His Right to Counsel

The prosecutor raises a new issue that was not decided by the Court of Appeals, although the Court suggested in a footnote that perhaps the prosecutor should have raised the issue.

Because this issue was not raised in the Court of Appeals and because the Court of Appeals never ruled thereon, Defendant submits that this Court should not consider it. There is no judgment to appeal, with regard to this issue.

In the event this Court considers this newly-raised issue, it has no merit. The People now claim that Defendant forfeited his right to counsel, citing *People Kammeraad*, 307 Mich App 98 (2014), a case which is clearly distinguishable. The defendant in that case specifically refused any and all attorneys throughout all pretrial proceedings, refused to leave his cell, refused to come to court, and was ultimately removed from the courtroom during trial due to his behavior. Appointed counsel was present throughout the trial (although counsel did not cross-examine witnesses or present evidence). The Court of Appeals found that, under these extreme and unusual circumstances, the defendant forfeited his rights by repeatedly repudiating them:

> This case presented a unique situation in which a defendant in a criminal prosecution indisputably and defiantly refused to participate in the trial and other judicial proceedings, indisputably and defiantly refused to accept the services of appointed counsel or to communicate with counsel, *regardless of counsel's identity*, indisputably and defiantly refused to engage in self-representation, indisputably and defiantly refused to promise not to be disruptive during trial, and indisputably and defiantly *refused to remain in the courtroom for his jury trial.* Under those circumstances … defendant's constitutional protections were forfeited and there was no constitutional obligation to impose a court-appointed attorney upon the unwilling defendant. If defendant wished to present no defense or challenge to the criminal charges and simply allow the prosecution to present its case-in-chief absent counsel or defendant's presence in the courtroom, whether for purposes of ideology, protestation, or otherwise, he was free to so proceed without any offense to his state and federal constitutional rights to counsel or self-representation. *Id.* at 126-127. (Emphasis added).

In stark contrast, Defendant Lewis did not reject any and all counsel "regardless of counsel's identity." He had a bona fide dispute with Mr. Scherer, who had disrespected him, and he wanted another attorney to represent him. The district court judge immediately stated that "he

[Lewis] has elected that he would prefer not to have a lawyer to represent him and we're going to proceed." (PET 4). Mr. Lewis stated, "I never said that." *Id*. This statement fell on deaf ears and the court ordered the prosecutor to proceed, with Mr. Scherer as stand-by counsel.[3] Understandably, Mr. Lewis then declared that "You're violating my rights." He told Mr. Scherer to leave him alone and stop harassing him. Defendant used some colorful language and stated that counsel had disrespected his dead mother. At this point, the court removed Mr. Lewis, told Mr. Scherer he was free to go, and conducted the preliminary examination without Defendant or any defense attorney. It is clear from the foregoing that Mr. Lewis had irreconcilable differences with his attorney and wanted another attorney, although the court cut short his explanation by immediately ordering the exam to proceed with Mr. Lewis representing himself. Mr. Lewis clearly indicated that he did not want to represent himself. Again, he did not repudiate any and all counsel; he merely had a dispute with the particular attorney representing him at the preliminary examination. Defendant did not knowingly and intentionally relinquish his right to counsel, either expressly or by his conduct, unlike the defendant in *Kammeraad*. He did not refuse to come to court for his trial, and he accepted the representation of counsel at trial.

Furthermore, in *Kammeraad*, although the Court of Appeals found the waiver of counsel incomplete, the trial court had followed the law and the court rule by attempting to obtain a waiver of counsel, which is what the defendant wanted by repudiating any and all attorneys:

> In the present case, the circuit court attempted to obtain a formal waiver of counsel by defendant, along with the attendant invocation of the right to self-representation, carefully imparting the information encompassed by MCR 6.005(D) and then directly querying defendant with respect to whether he wished to represent himself. Id. at 129.

This advice was not imparted to Mr. Lewis.

[3] The court apparently did this to protect Mr. Scherer from a potential grievance.

In the case relied upon by *Kammeraad*, *State v Mee*, 756 SE2d 103 (NCApp, 2014), the behavior of the defendant was very similar to that in *Kammeraad* (the defendant repeatedly refused to come to court or accept any assistance of counsel). Both *Kammeraad* and *Mee* are extreme cases. There is nothing unusual in a case, like the instant one, where a defendant has disagreements with appointed counsel.[4] As the Court emphasized in *Kammeraad*: **"[W]e emphasize that a finding of forfeiture of this venerable constitutional right should only be made in the rarest of circumstances and as necessary to address exceptionally egregious conduct**." *Id*. at 137. (Emphasis added). The instant case does not present such rare circumstances or exceptionally egregious conduct. Mr. Lewis did not forfeit his right to counsel.

Because Mr. Lewis was denied counsel (as well as his right of confrontation) at a critical stage of the proceedings and the errors are structural, the Court of Appeals was correct in reversing his convictions. Defendant submits that this Court should deny leave to appeal.

[4] Mr. Scherer was Defendant's second appointed counsel. Mr. Lewis had a bona fide dispute with previous counsel, Mr. Cooper, because Cooper had talked to him for only two minutes in the preceding four months. (Mr. Procida only stood in for Mr. Cooper at the competency hearing).

SUMMARY AND RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to DENY Plaintiff-Appellant's application for leave to appeal.

Respectfully submitted,

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BY: /s/ Chari K. Grove
_____

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